Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

RICHARD C. BALDWIN,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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October, 1997

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QUESTIONS PRESENTED

1. Whether, under the Fifth and Sixth Amendments to the United States Constitution, Petitioner had the right to the assistance of counsel, or a tape recorder, during questioning by the prosecutor's retained psychiatrist.

2. Whether, under the Fifth and Sixth Amendments to the United States Constitution, Petitioner had the right to the assistance of counsel in deciding whether to submit to questioning by the Commonwealth's retained psychiatrist.

3. Whether, if Petitioner had the right to the assistance of counsel in deciding whether to submit to questioning by the Commonwealth's retained psychiatrist, that right was violated when defense counsel advised petitioner not to submit, refused to change his advice despite pressure from the Court, and petitioner, accepting the advice of counsel, one time rebuffed the psychiatrist, but at a later interview without counsel present yielded to interrogation.

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PETITION FOR A WRIT OF CERTIORARI

Richard C. Baldwin respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts.

OPINION BELOW

The opinion of the Supreme Judicial Court is reported at Commonwealth v. Baldwin, 426 Mass. 105, 686 N.E.2d 1001 (1997) (App. A) [Docket Number 06875].

JURISDICTION

The Supreme Judicial Court entered judgment on November 10, 1997 and on December 30, 1997 denied Petitioner's timely request for rehearing.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that, "No person ... shall be compelled in any criminal case to be a witness against himself ..."

The Sixth Amendment to the United States Constitution provides in relevant part that, "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence".

STATEMENT OF THE CASE

1. Prior Proceedings

On November 18, 1992, petitioner was charged in the Haverhill District Court, Juvenile Session,

with being a delinquent child by reason of murder. A mandatory "transfer hearing" was held and on July 7, 1993 the Court ordered petitioner bound over to the Essex County Grand Jury.

On July 14, 1993, the Grand Jury indicted petitioner for murder.

On December 23, 1993, petitioner filed a Notice Regarding Diminished Capacity and on January 5, 1994, the Commonwealth filed a Motion for Psychiatric Examination [of petitioner]. The Commonwealth's motion was immediately heard and allowed with no conditions placed on the Commonwealth's examination.

On January 12, 1994, petitioner petitioned the Supreme Judicial Court for Suffolk County for a protective order. The petition raised the first and second federal questions presented for review. The petition was denied by Memorandum And Order of the Court dated January 31, 1994 (App. C).

On February 7, 1994, petitioner filed in the Superior Court a Motion for Reconsideration [of the Court's refusal to condition the Commonwealth's examination]. The motion again raised the first and second federal questions presented for review. The motion was denied on February 11, 1994.

On March 23, 1994, petitioner filed a motion to suppress the testimony of the Commonwealth's psychiatrist, Martin Kelly, M.D. By endorsement dated the 23rd, the Court declined to take action on the motion. The motion to suppress raised the third federal question presented for review.

On March 25, 1994, trial began and on March 29, 1994, the Commonwealth rested. On March 30 - April 1, 1994, petitioner introduced evidence that he was neither criminally responsible nor able to

premeditate the offense or form a specific intent. On April 1, 1994, the Commonwealth introduced rebuttal testimony of Martin Kelly, M.D.

On April 4, 1994, the jury found petitioner guilty of murder in the first degree.

On April 7, 1994, petitioner filed his claim of appeal and on May 4, 1995, his case was entered in the Supreme Judicial Court. Before the Supreme Judicial Court, petitioner raised the three federal questions presented for review. The first and second questions were explicitly determined adverse to the federal right asserted. The third federal question was not discussed in the Court's opinion, but was implicitly determined adverse to the federal right asserted (App. A).

2. Statement of Facts

On April 25, 1976, Richard Baldwin was born to Maryann Gail Mitchell and Roger Baldwin (IX-11)[1]. Mitchell was an unwed nineteen year old half French, half Micmac Indian (IX-60), raised on a reservation in Quebec (IX-58). Baldwin was a twenty-nine year old electronics salesman who had been married for eight years to a Japanese woman who had fled (IX - 8).

Mitchell testified that Baldwin drank heavily and abused her (IX - 61-65). Baldwin testified that Mitchell drank heavily and abused him (IX - 11-15).

When Richard was between five and seven, Mitchell and Baldwin separated. Mitchell claimed that Baldwin was drinking from the time he got home (IV - 61). Baldwin claimed that Mitchell was sleeping,

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[1] Richard Baldwin shall be referred to by his first name to distinguish him from his father, who will be referred to by his last name.

even in front of the child, with a good portion of the Marlboro, Massachusetts police force (IX - 15-16). A battle for Richard's heart and body ensued (IX - 19-21, 66-67). Baldwin secured Richard's body and moved with him to Ranchita, California. Several months later, Mitchell, who now knew where Baldwin was, called to say she was too ill to care for their daughter Krissy and would Baldwin take her (IX - 24, 70).

Baldwin, Richard and Krissy lived in Ranchita for three years. Initially Baldwin cut back his drinking, but he regressed (IX - 26, 31). He began to abuse Richard, calling him a dumb Indian and beating him around (IX - 28-29, 107).

Richard began having difficulties at school. As a toddler, he had been assessed a gifted child. As a first through third grader, he had earned nothing but A+s (IX - 23). His first two years in California, his fourth and fifth grade years, his grades remained good, but he began missing school.

The next year Baldwin moved with Richard and Krissy to Meriden, Connecticut. Baldwin was drinking heavily and beating Richard (IX - 32). Richard's grades plummeted as he missed forty-six out of one hundred eighty days of school (IX - 109). He was sleeping erratically, as much as seventeen hours, or as little as four hours a night (IX - 34-35).

The next year, Richard's eighth grade year, Baldwin moved to Groveland, Massachusetts (IX - 109-110). Baldwin's drinking and beatings continued (IX - 110). Richard began missing school for weeks at a stretch and was temporarily committed to a hospital (IX - 110-111).

The next year Richard made his one friend, Skye Albert Hall. He began sleeping regularly and

going to school. His grades improved. Richard referred to the year as "his perfect year" (IX - 112).

At the end of the ninth grade Hall moved to Seattle. Richard was devastated. He began sleeping erratically, secluded himself, and the next fall dropped out of school (IX - 39-116).

At the end of the school year Skye Hall returned. Richard rebounded, spending all his time with Hall and, with Hall around July 4th, meeting Hall's neighbor, the victim, Beth Brodie (IX - 46). With Brodie, Richard commenced an idealized platonic relationship (IX - 119), in keeping with the ideology of his long celibate father, who preached that women were either saints or whores (IX - 47).

By fall, things were falling apart. Baldwin was facing life-threatening surgery, and was moving his family again, this time to Peabody. Richard was cut off from Hall, and Brodie spurned his affections, writing in German that she hated him (IX - 121). Richard brooded for weeks over this (IX - 121-122).

When the school year commenced, Richard balked at going to Peabody High School and was given a tutor, whom he liked. In addition, Richard obtained his license and was able to visit Hall. Also, he received a letter from Brodie (IX - 51) that gave him hope and he made plans to double-date with Hall on Tuesday, November 17. The Friday before the date, Peabody terminated Richard's tutoring and ordered that he go to the high school or an alternative school (IX - 50). Richard chose the alternative school.

Driving to the mall that Sunday with Brodie, Richard missed the exit and exploded. For this he excoriated himself, but all was not lost, they found the mall and, he thought, had fun. To Richard it was like the summer all over again (IX - 136).

The next day Richard went to the alternative school for the first time. In class he began to shake and sweat (IX - 136). The nurse contacted Baldwin and told him to take Richard home. Baldwin retrieved Richard and left him with the car (IX - 52).

Richard drove home and called Hall. Hall and Brodie did not have school that day due to parent/teacher conferences. Hall, who had call waiting, said he was on the phone with Brodie and would have to call back (V - 67). Richard called him again almost immediately. He wanted to know Brodie's reaction to the night before (V - 68). Hall replied that Brodie had had fun, but did not want to resume a relationship (V - 69).

A short while later, at approximately 2:15 p.m., Richard called Hall again and said simply, "I'm out" (V - 70-71). Brodie did not want a relationship with him; he had no reason to live; he wanted to die (V - 71).

At approximately 4: 30 p.m., Richard Baldwin walked into Hall's home (V - 74-75). He was carrying a prescription bottle of pills (V - 76), but said he did not know whether he was going to kill himself (V - 77) and asked Hall to contact Beth Brodie so that he could talk to her (V - 78). After speaking to her by phone, Hall reported that she was not dressed and did not want to see him (V - 79). After Richard insisted, Hall walked the short distance to her home (V - 80).

Brodie agreed to see petitioner and followed Hall to Hall's house. Leaving petitioner and Brodie downstairs, Hall went upstairs (V - 83). Five to ten minutes later Brodie appeared and said that Richard thought he, Richard, was upsetting her (V - 83-84). Minutes later, Brodie returned and said in a normal tone that Richard had said he was going to kill her. Moments later petitioner appeared and asked "Are you

scared?" (V - 90-92). When Brodie did not respond, petitioner stepped into the room, revealing a metal baseball bat. Again he asked Brodie if she was scared (V - 95). She said "yes" in a sarcastic tone. He then raised the bat and saying "And I was going to be a baseball player", began to walk toward Brodie, asking her forcefully, "Are you scared?" (V - 97-98). When Brodie retorted by asking petitioner why he was "being so retarded", he asked her if she wanted to turn around, hesitated, then swung the bat (V - 98-108).

The defense, lack of criminal responsibility/ incapacity to premeditate, was supported by the opinions of a psychiatrist and a psychologist who relied in part on statements of petitioner.

George Hardman, M.D. was a cum laude graduate of Harvard University and Harvard Medical School, working as a consultant to court clinics, school systems, hospitals and the Department of Youth Services (VII - 82-83). He had performed approximately 5,000 forensic evaluations (VII - 85).

Dr. Hardman first saw Richard Baldwin on April 7, 1993, to assess on behalf of the Department of Youth Services for therapeutic purposes an incident which occurred in the detention unit (VII - 89). The incident mirrored the Oedipal triangle dynamics of the offense (VII - 89).

Dr. Hardman noted that petitioner came from a dysfunctional family, marked by alcohol and drug abuse and verbal and physical aggression between the father and mother and later between the father and petitioner. He also noted that petitioner suffered a separation from his mother at an age where petitioner would be expected to be going through the Oedipal stage of development, a stage where a youth is close to his mother and jealous of and in competition with his

father. The history had two overriding influences. First, the loss of his mother caused petitioner to be fixated at the Oedipal stage, leaving him vulnerable to loss and stress in triangular relationships (VII - 108-109). Second, the combination of the petitioner's love for and dependence on his father and his father's abusiveness caused petitioner to repress all feelings of anger against his father, sapping petitioner of self-esteem and leaving him anxious and depressed (X - 100). Dr. Hardman noted that petitioner's history of school phobia, sleep and eating disorders and performance on projective tests all supported a conclusion that petitioner suffered from chronic depression, intermittently major (VII - 112-113).

Dr. Hardman reasoned that in the fall of 1992 the stresses within and upon Richard Baldwin came to a head. He was dependent on Hall and thought he was taking Brodie from him. Conversely, he was dependent on Brodie and thought Hall was taking her from him (VII - 107, 224). In addition, he idolized Brodie in his black versus white matrix, but was angered by her indifference. He was fighting with his father about his not wanting to go to school, but was relying on his father to save him from having to go to school (VII - 130-131). On top of that, he was ordered to attend the alternative school, depriving him of the support of his tutor, shattering the myth of his academic brilliance and shattering his faith in his father's ability to protect him. Id. All the while Richard's punitive ego was blaming him for not living up to his perfectionist goals (VII - 119).

His thinking became confused. He began ruminating about the meaning and injustice of Brodie's "hate" letter and about suicide (VII - 111).

In Dr. Hardman's opinion, when Richard told Hall on the 18th that he was going to commit suicide, his wish was that Hall would rescue him (VII - 125). Then, when Brodie scorned him, he wanted her to feel guilty (VII - 127). As his anger at her indifference worked the outward turning of his aggression, petitioner described what Dr. Hardman referred to as a disassociative reaction: the petitioner felt as if everything began to move in slow motion and he was off in the corner of the room looking on (VII - 130, 208). Dr. Hardman opined that when petitioner killed Brodie he was overcome by symptoms of major depression, repressed aggression (VII - 124) and a subconscious recapitulation of the violence between his father and mother (VII - 135), that his cognitive, emotional and intellectual facilities were not operating in conjunction with each other (VII - 135), as indicated by his dissociative reaction, and that he was not able to differentiate right from wrong, to conform his conduct to the requirements of the law or to premeditate (VII - 124, 133).

Dr. Jean Tomich was a clinical psychologist with over twenty years experience evaluating juveniles (IX - 82). As had Dr. Hardman, Dr. Tomich had come to the task of evaluating Richard Baldwin from a neutral position: she was appointed by the Haverhill District Court to be the independent evaluator wedged between the hired guns during the Transfer Hearing (IX - 83).

In addition to the family history, Oedipal issues and symptoms of depression noted by Dr. Hardman, Dr. Tomich noted the way Richard was manipulated by his father in his father's war with his mother, the effect on Richard of Baldwin's perverse view of women and grandiose view of Richard, the severity of

Richard's super ego, flailing him for his shortcomings, and the reinforcement of Baldwin's abusiveness in this regard, Richard's inability to perceive himself as abusive due to his identification with the abused, Richard's dependence on the predictability of place in light of the unpredictability of relationships, and the change in the boundaries of Richard's relationship with his father epitomized by Richard for the first time becoming the aggressor and the convergence of the change with Baldwin's becoming gravely ill.

In Dr. Tomich's opinion, the convergence of losses during the fall of 1992 sent the dysthymic petitioner into an episode of major depression (IX - 152), during which came the encouraging letter from Brodie. As the clinically depressed often do, Richard placed all his hope on an idealized vision of Brodie. Then Brodie scorned him (IX - 137-138).

From that point on, petitioner's focus was on killing himself and getting Brodie to understand his feelings (IX - 138, 145, 164). He lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law, because he was driven by "a lot of very strong feelings that he had no access to at all" (IX - 168). He could not premeditate or focus the mind on a specific intent to kill Brodie because he was focused consciously on another purpose, an entirely different feeling toward Brodie than anger (IX - 140).

Martin Kelly, M.D. testified for the Commonwealth. He was a 1961 graduate of Boston College, and a 1965 graduate of Tufts University School of Medicine. He had performed between ten and twenty-five forensic evaluations of juveniles (X - 25). Although Dr. Kelley was retained by the Commonwealth, he claimed impartiality, asserting that he

testified between 25% and 35% of the time for the defense, an assertion which uncovered the statistical anomaly that, in the up to three hundred cases where he was retained by the Commonwealth, only "several" of the defendants were not criminally responsible, but, in the seven cases in 1993 where his opinion was requested by defense counsel, all of the defendants were not criminally responsible (X - 182-184).

Before turning to Dr. Kelley's assessment of petitioner's criminal responsibility/diminished capacity, the pre-testimony events involving Dr. Kelley which relate to the federal questions presented must be discussed. On January 5, 1994, the Commonwealth filed its Motion for Psychiatric Examination [of petitioner]. The motion was immediately heard. Petitioner opposed the motion on the grounds that it was unauthorized by the Massachusetts Rules of Criminal Procedure. More strenuously, petitioner demanded that defense counsel be present, or the examination be tape recorded. The Court allowed the Commonwealth's motion without imposing any conditions. The prosecution nevertheless agreed to allow counsel to attend Dr. Kelly's examination, until Dr. Kelly demanded that the prosecutor renege. Thereafter, on January 12, 1994, petitioner filed with the Single Justice of the Supreme Judicial Court his petition for a protective order. On January 29th, the Commonwealth moved to dismiss the petition. In support of its motion, the Commonwealth filed the affidavit of Dr. Kelley, which stated that the presence of a third element (tape or video recorder) broke the connection between psychiatrist and individual, and constricted the individual's spontaneity. Petitioner filed in rebuttal Dr. Kelley's testimony in Commonwealth v. Charles C. Delaney, III, that there

was naturally an air of tension when he examined a defendant, that rapport was not essential, and that it would be appropriate for a defendant to be guarded and Dr. Kelley's testimony in Commonwealth v. Prendergast, that he routinely advised defendants that they had a right not to answer any question and to have their attorneys present.

By memorandum and order dated January 31, 1994, the Single Justice denied petitioner's petition (App. C). Petitioner then filed in Superior Court his motion that the court "reconsider its refusal to condition its allowance of the Commonwealth's motion to examine the defendant". That motion was denied on February 11, 1994. In the interim, Dr. Kelly went to examine petitioner, but was given a note that, upon advice of counsel, petitioner declined to be examined. Thereupon, on February 17, 1994, petitioner's counsel informed the Commonwealth that he would continue to instruct petitioner to exercise his rights under the Fifth Amendment to the United States Constitution, not by declining to talk to the Commonwealth's expert, but by conditioning his willingness to talk upon being allowed to tape record the interrogation. Immediately the Commonwealth scheduled a hearing before the trial judge. At the hearing, petitioner's counsel refused to change his instructions to his client.

On February 24, 1994, Dr. Martin Kelly traveled to the Westboro Detention Center where petitioner was being held. There he informed petitioner that the court had ordered a psychiatric examination, and that what he said in the course of the examination would not be confidential. When petitioner asked if he had a right to tape record the questioning or have an attorney present, Dr. Kelley

replied that he did not. Petitioner then yielded to interrogation by Dr. Kelly.

On March 23, 1994, petitioner filed a motion to suppress testimony by Dr. Martin Kelly based upon his interrogation of petitioner. The Court declined to take any action on the motion on the asserted grounds that the "propriety of the court's order pursuant to M.R.Crim.P. 14(b)(2) was the subject of a petition to and ruling of the Supreme Judicial Court". Id.

Dr. Kelly testified that petitioner suffered from no mental illness, he was simply narcissistic.

Cross-examination pursued five angles: Dr. Kelly was biased; suicide was retroflexed murder; petitioner met the diagnostic criteria for dysthymia, and, at the time of the offense, for major depression; petitioner's description of what happened at Hall's house suggested that he was in a disassociative state; and Dr. Kelly's opinions were based on characterizations of petitioner's statements, demeanor and thought processes which could not be tested, because Dr. Kelly took virtually no notes and prevented recordation of his interview of petitioner (X - 67-133).

Angle one uncovered the statistical anomaly discussed supra at Page 11. Angle two found support in an article Dr. Kelly had authored, but obtained no concession of a link between suicide and inwardly directed anger, or between suicide and homicide (X - 71-77). Angle three was cut off by Dr. Kelly: he would not acknowledge the symptoms (X - 79-87), and when confronted by a hypothetical incorporating the diagnostic criteria stated in the Diagnostic And Statistical Manual of Mental Disorders (Third Edition - Revised), he dismissed the manual (X -109-110, 170-171). Angle four was cut off in the same way: Dr. Kelly dismissed the criteria for diagnosing a

disassociative state (X - 126-132). Finally, angle five was cut off by the court (X -92-93, 95, 96, 145-146): counsel was prohibited from demonstrating the fact of or inquiring into the reasons for Dr. Kelly's insistence that there be no record of petitioner's actual statements, actions, demeanor or thought processes. Id.

REASONS FOR GRANTING THE PETITION

1. The Issues Are Too Important Not To

Certiorari should be granted because the issues presented are important and Dr. Kelly's adversarial approach to his role as hired-gun compels a finding that he was an agent of the prosecution and, for that reason, affords circumscribed holdings.

Along with the placement of the burdens of production and proof and the right to trial by jury, the right to remain silent and to the assistance of counsel form the cornerstones of our criminal justice system. Because of the importance of these rights, their application to virtually all post complaint or indictment proceedings has been determined, to virtually all except court ordered examinations of defendants who interpose mental health-based-defenses or denials of offense elements. Where psychiatric examinations are common and often uncontrolled, the practical necessity of determining the Fifth and Sixth Amendment rights of defendants ordered to undergo psychiatric examinations by psychiatrists hand-picked by the prosecution equals the jurisprudential significance of what the court will pronounce.

Only Estelle v. Smith, 451 U.S. 454 (1981) and Buchanan v. Kentucky, 483 U.S. 402 (1987) come close to addressing the fundamental issues presented by petitioner's case and their import has been variously construed. In Estelle, the state had introduced at the penalty phase of a capital murder case the damning opinion of a psychologist who, pursuant to court order, had examined the defendant for competency without notifying defense counsel or advising the defendant that he had a right to remain silent. Rejecting the state's argument that, "incrimination is complete once guilt has been adjudicated", the Court held that the Fifth Amendment was infringed. Estelle at 464. At the same time, the Court limited its holding to "a criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence". Id. at 469.

In Estelle, the Supreme Court also held that introduction of the psychologist's testimony violated the petitioner's Sixth Amendment right to the assistance of counsel. Id. at 474. In reaching its holding, the Court appeared to accept the United States v. Wade, 388 U.S. 218, 226-227 (1967) "critical stage" test for determination of the attachment of Sixth Amendment rights and appeared to find that the psychiatric examination was a "critical stage", Id. at 468-471. At the same time, the Court limited its holding to the accused's right to the assistance of counsel "in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed", Estelle at 472, noting that whether the accused had "any constitutional right to have counsel actually present during the examination" was not before it. Id. at Note 14.

In Buchanan, a murder defendant's attorney, to establish an affirmative defense of "extreme emotional distress", had the defendant's social worker read from several reports and evaluations which arose out of a prior arrest of the defendant. In rebuttal, the prosecutor had the social worker read from another report which arose out of the same prior arrest and from the report of a doctor (presumably a psychologist) who examined the defendant after his arrest for the murder for which he was on trial, at the joint request of the prosecutor and defense counsel, but on the limited issue of the appropriateness of an involuntary hospitalization for psychiatric treatment. The Court held that introduction of the doctor's report for the limited purpose of rebuttal of a psychiatric defense did not violate the Fifth Amendment. Buchanan at 422. The Court reasoned that a contrary holding would place the government at an unfair disadvantage, Id., and noted that Estelle was limited to "a criminal defendant who neither initiates a psychiatric evaluation nor introduces any psychiatric evidence". Estelle at 469.

In Buchanan, the Court also held that the introduction of the doctor's report did not violate the petitioner's Sixth Amendment right to the assistance of counsel. Id. at 425. The Court reasoned that, since petitioner's counsel requested the psychiatric evaluation, it could be assumed that defense counsel consulted with petitioner about the nature of the examination and counsel should have anticipated the use of the psychological evidence. Although Buchanan's Sixth Amendment holding has little impact on the issues raised by petitioner, petitioner feels compelled to state his preference for the logic of the dissent: because the examination was for a limited

purpose far removed from assessing the defendant's mental condition at the time of the crime, nothing put the defendant or counsel on notice that the defendant's statements could be used to rebut temporally and functionally unrelated evidence. Id. at 433-434.

Absent guidance from the Supreme Court on the issues presented by petitioner's case, lower court opinions go every which way. Some courts hold that the Fifth Amendment is not implicated because psychiatric examinations seek "real", not "testimonial" evidence. See United States v. Handy, 454 F.2d 885, 889 (9th Cir. 1971), cert. denied 409 U.S. 846 (1972). Other courts hold that the Fifth Amendment is not implicated because sanity is an issue apart from guilt. People v. Galimanis, 765 P.2d 644, 647 (Colo. Court of Appeals 1988). Compare United States v. Davis, 93 F.3d 1286, 1295 No. 8 (6th Cir. 1996): Fifth Amendment privilege is not violated when the defendant claims insanity, because sanity is an issue apart from elements of crime, but where defendant claims diminished capacity, he is attacking an element of the offense and "any compelled examination will necessarily involve self incrimination". Other courts concede that court ordered psychiatric examinations implicate the Fifth amendment, but hold that, where the defendant interjects a psychiatric defense, or, as some courts limit the rule, where he interjects a psychiatric defense and supports it with expert testimony relying on the expert's examination of the defendant, the defendant waives his right to remain silent when confronted by the government's psychiatrist. See State v. Tallabas, 155 Ariz. 321, 742, P.2d 491 (Ariz. App. 1987). Other courts hold that the Fifth Amendment does not apply to forced psychiatric examinations simply because the contrary result

would be too "unreasonable and debilitating". United States v. Byers, 740 F.2d 1104 (D.C. Cir. 1984). See also United States v. Phelps, 955 F.2d 1258 (9th Cir. 1992).

As to a defendant's right to counsel, lower court discord is stark: some courts perceive a right to counsel, others do not. See Lee v. County Court of Erie County, 27 N.Y.2d 432, 267 N.E.2d 452 (Court of Appeals, N.Y. 1971) and Houston v. State, 602 P.2d 784 (S.Ct. Alaska 1979) holding in reliance on United States v. Wade, 388 U.S. 218 (1967) that there is a right to counsel at court ordered psychiatric hearings. Compare Byers, supra.

2. Petitioner's Is The Case In Which To Address The Issues

Fifth Amendment Analysis

In Blaisdell v. Commonwealth, 372 Mass. 753, 760, 364 N.E.2d 191 (1977), the Supreme Judicial Court held that court ordered psychiatric examinations "implicate" a defendant's Fifth Amendment right against self-incrimination. The Fifth Amendment, the Court noted, provides that a defendant shall not be "compelled" to be a "witness against himself", these terms meaning to give evidence against oneself of a "testimonial character". Blaisdell, supra at 758-759. Rejecting holdings from other jurisdictions that statements to a government psychiatrist are analogous to non-testimonial evidence like "fingerprints, voice exemplars, handwriting exemplars, blood samples", Id. at 759-760, the Court held that the statements of a defendant in a court ordered psychiatric examination were both "compelled"

and "testimonial". Id. Accordingly, absent a constitutionally adequate grant of immunity or a valid waiver of the privilege, a defendant has a right at a court ordered psychiatric examination to remain silent or to condition his offer to waive his right to remain silent. Id. at 761. See also Miranda v. Arizona, 384 U.S. 436, 444-445 (1966).

The court then dismissed the notion that a state statute limiting use of the defendant's statements to the issue of criminal responsibility was a "constitutionally adequate grant of immunity", before addressing the waiver issue and holding:

> If ... a defendant voluntarily submits to psychiatric interrogation as to his inner thoughts, the alleged crime and other relevant factors bearing on his mental responsibility and, on advice of counsel, voluntarily proffers such evidence to the jury, we feel that the offer of such expert testimony, based in whole or in part on a defendant's testimonial statements, constitutes a waiver of the privilege for such purposes.

Blaisdell, supra at 766. The waiver occurs upon the petitioner's voluntary proffer of expert testimony based on his statements. In addition to Blaisdell at 766, quoted above, see Blaisdell at 764:

> The mere fact that a defendant gives notice of an intention to interpose a defense of insanity cannot be construed as a waiver of his privilege against self- incrimination, for a waiver of that privilege comes about in

context of a criminal trial only when the defendant takes the stand to give testimonial evidence in his own behalf.

If the waiver of privilege arising from the introduction of expert testimony has yet to occur, it is inescapable as a point of logic that, at a court ordered psychiatric examination, the defendant possesses his panoply of Fifth Amendment rights. These include the right to remain silent and the right to condition a waiver of the right. Miranda v. Arizona, supra at 444-445. The defendant faces the possibility of adverse consequences if he elects to remain silent, or places unreasonable conditions on an offer to waive his right to remain silent, see Blaisdell at 769, but the possibility of adverse consequences upon the exercise of a privilege cannot itself eliminate the privilege.

In petitioner's case, the Supreme Judicial Court reaffirmed all of the Blaisdell predicates to petitioner's argument, see Commonwealth v. Baldwin, 426 Mass. 105, 109-110, 686 N.E.2d 1001 (1997), but asserted in circumvention that, while the waiver of the right to remain silent occurs only when the defendant at trial decides to introduce expert testimony relying on his statements, because that voluntary decision is what triggers the Commonwealth's right of access to and use of the results of their psychiatrist's interrogation of the petitioner, up to that moment of waiver, the petitioner's Fifth Amendment Rights are protected by "a constitutionally adequate grant of immunity", Baldwin at 109-110.

The flaw in the Court's argument is that it merely seeks to do indirectly what cannot constitutionally be done directly: if petitioner has a right to condition upon the presence of counsel a

waiver of his right to remain silent, see Miranda v. Arizona, supra, the right cannot be eradicated by the device of a transient grant of immunity.[2]

Turning to the "simple bare necessity" line of cases, in the opinion of the plurality in United States v. Byers, supra, the Supreme Judicial Court's finding of a voluntary waiver was denigrated as "at best a fiction". Byers at 113. In fact the plurality denigrated all the bases upon which forced psychiatric examinations have been approved, before holding that forced psychiatric examinations did not violate the Fifth Amendment because the contrary result would be too "unreasonable and debilitating". Id. The right against self-incrimination, because it is too important to yield to "reasonable intrusions", United States v. Watson, 423 U.S. 411 (1976), must disintegrate before them! Bear in mind for later use the finding of legislative fact invoked to justify the disintegration: psychiatry is too inexact a science for cross-examination to demonstrate the error in a psychiatrist's analysis. Byers at 1114.

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[2] The argument also presumes that the purposes of the petitioner's right to remain silent are limited to the exclusionary rule which, to the contrary, is just one of the ways the petitioner's right is protected, and not a constricting definition of the right. See., e.g., Murphy v. Waterfront Commission, 378 U.S. 52 (1964), Tehan v. United States Ex. Rel. Shott, 382 U.S. 406 (1966), Miranda v. Arizona, supra, and other cases declaring that the amendment has broader purposes, including, but not limited to, protecting the individual's "private enclave where he may lead a private life", Murphy at 55, "his right ... to be left alone", Tehan at 416, his "dignity and integrity", Miranda at 460.

After exalting convenience over principle, the Byers plurality resorts to principle in rejecting the argument of the minority that, if the practical needs of the prosecution necessitate cutting into the defendant's Fifth Amendment right, then the excision must be limited to the necessity, e.g., that since tape recording the psychiatric examination would serve many of the purposes of the Fifth Amendment without hamstringing the prosecution, that remnant of the defendant's rights must be preserved. See Byers 1147 to 1161. Although the solution "may be a good idea", Byers at 1121, "It is a due process rather than a self-incrimination issue." Id. at 1115. To the contrary, the imperative to narrow restrictions upon the exercise of constitutional rights has traditionally been viewed as derived from the affected constitutional right. For example, the imperative that restrictions upon speech be "narrowly tailored" derives from the First Amendment, not the due process clauses of the Fifth or Fourteenth Amendments. Furthermore, if protecting a remnant of a defendant's Fifth Amendment rights appears to be a due process issue, it is because the plurality, in the first instance, denigrates the defendant's Fifth Amendment rights:

> If, as the plurality asserts, the cost of the safeguard determines whether the right exists, then clearly a defendant subject to a court ordered examination should be afforded the relatively costless Fifth Amendment protections that I suggest. I must also, however, challenge the plurality test itself.
>
> ...

> I cannot agree with the pluralities' suggestion that the privilege is self limiting. The privilege is premised on an a priori belief that a "fair state - individual balance" is one in which incriminating testimony is not compelled.

Byers (Bazelon dissent) at 1159. Moreover, the due process clause does overlap and interact with the Fifth Amendment, witness: what are now construed as Fifth Amendment issues were, prior to the 1960s, "treated under the rubric of due process". Id. at 1159-60. As Senior Circuit Judge Bazelon concluded:

> As the Miranda court noted, the privilege "has always been 'as broad as the mischief against which it seeks to guard'". [Miranda at 384 U.S. 459-460] The forensic examination presents a clear risk of type of "mischief" that the court has declared anathema to the policies of the privilege. The suggested safeguards are closely tailored to remedy that mischief. Tape recording, for example, not only enhances trustworthiness, but also protects against the central evil to which Miranda was directed, the risk of coercion and deception in extracting statements from a criminal petitioner.
>
> ...
>
> The pluralities' dismissal of these safeguards as "exotic" reflects a crabbed construction of the privilege wholly at odds with the unambiguous pronouncements of the Supreme Court. As the court has said of

> the privilege: "[t]his constitutional protection must not be interpreted in a hostile or niggardly spirit". [United States v. Henry, 447 U.S. 264, 269 (1980)]. In constructing a false dichotomy between a completely unmonitored psychiatric interrogation, on the one hand, and the absence of any compelled evaluation on the other, this court has manifestly failed to heed the Supreme Court's precepts.

Byers at 1161.

Sixth Amendment Right to Counsel

In Commonwealth v. Trapp, 423 Mass. 356, 668 N.E.2d 327 (1996), the Supreme Judicial Court, after not one word of analysis, cited the "exhaustive analysis in United States v. Byers" and declared:

> Although the decision to undergo psychiatric evaluation is a critical stage, see Estelle v. Smith, 451 U.S. 454, 470 (1981), the interview is not. Byers, supra at 1118-1121.

Commonwealth v. Trapp, supra at 359. Trapp spoke only in dicta about a defendant's right to record the psychiatric examination, subjecting it to judicial discretion, Id., and did not address what happens when, after counsel notifies the Commonwealth that he will permit an examination only if it is recorded and the defendant, a juvenile, himself invokes his right to remain silent absent counsel, the Commonwealth's psychiatrist terrifies the juvenile into disregarding the advice of his attorney. In

petitioner's case, however, the Supreme Judicial Court elevated to the status of a holding the Trapp judicial discretion dicta and expressed no qualms about the prosecution's expert overbearing the advice of defense counsel. Baldwin, 426 Mass. 105-112. Compare Rivera v. Collins, 934 F.2d 658, 662 (5th Cir. 1991) (violating a defendant's right to consult with his attorney prior to a court ordered psychiatric examination is harmless).

To petitioner, the Sixth Amendment issue is simple and direct: after the commencement of "adversarial judicial proceedings", the petitioner has a right to the assistance of counsel at any "critical stage", "critical stage" defined as any (1) "confrontation" with the government, (2) "where counsel's absence might derogate from the petitioner's right to a fair trial", or "impair the defense". United States v. Wade, 388 U.S. 218, 226-227 (1967) (emphasis added), Gerstein v. Pugh, 420 U.S. 103, 122 (1975). An interrogation by someone retained by the prosecution is a "confrontation" where counsel's absence might derogate from the petitioner's right to a fair trial "or impair the defense, ergo, the right to the assistance of counsel attaches. See Brewer v. Williams, 430 U.S. 387 (1977). It is not necessary that the interrogator be a police officer or the prosecutor; it is sufficient that he be an agent of the prosecution. See United States v. Henry, 447 U.S. 264 (1980) (police informant); Messiah v. United States, 377 U.S. 201 (1964) (police informant outfitted by police with radio transmitting equipment).

The Byers' plurality opinion - which is virtually the only opposing authority that seeks to explain itself - maintains that United States v. Ash, 413 U.S. 300 (1973) added to the Wade "critical stage" test a requirement that the defendant be confronted by a

"law related choice" or his "expert adversary". Byers 1117-1119. In Wade, the court held that an accused has a right to the assistance of counsel at a post-arraignment, pretrial lineup, reasoning that the lineup is a "confrontation" and that counsel's absence "might derogate from the accused's right to a fair trial". Wade at 226-227. In support of the latter point, the court noted that counsel might notice "suggestive influences" which the accused might be less able to detect due to lack of experience or "emotional tension". Id at 230-231. In addition, the accused would likely be credibility challenged. Id.

In Ash, the Court declined to extend the right to counsel to post-arraignment, pretrial photo identifications, holding simply that, because the defendant is not present, photo identifications are not "confrontations". Ash, supra at 317-321. Eschewing the clear difference between Wade and Ash, the Byers plurality picks and chooses, from a discussion in Ash of the historical development of the right to counsel, references to the "procedural system" (Byers at 1117 referencing Ash at 310), "legal problems" (Byers at 118 referencing Ash at 313) and "law" (Byers at 1118 referencing Ash at 317) to graft the "law - related choice" element, and references to "expert" and "professional adversary" (Byers at 118 referencing Ash at 310 and 317) to graft the disjunctive "expert adversary" element. To the legal historians of the court, the "law related choice" limitation should be galling: it harks back to the eighteenth century English rule that the right to counsel attaches only to "matters of law", not to "matters of fact". United States v. Wade, supra at 224. As for the "expert adversary" limitation, try as it does, the plurality cannot distinguish United States v. Henry.

More troubling than the plurality's narrowing of the test of what is a "critical stage" are its findings that the prosecutor's retained expert is not an "expert adversary" of the defendant, Byers at 1120, and defense counsel presence at a psychiatric examination would be "antithetical". Id. There are many psychiatrists devoid of intrinsic prosecutorial/ defense bias. There are even a few psychiatrists immune to the influence of team loyalty. But to find that retained experts never participate as adversaries "up until the point of [their] testimony" is naïve. Consider what happened in this case: in arguing that petitioner was not amenable to treatment as a juvenile, the Commonwealth's first hired gun, Dr. Latham, stated conclusions amounting to an opinion that petitioner was not criminally responsible (Record Appendix to Petitioner's Brief before the Supreme Judicial Court at p. 67-68). Asked to testify at trial for the defense, the hired gun refused, Id. The Commonwealth then went out and retained Dr. Martin Kelly, the expert 10,000% more likely to find a defendant criminally responsible when retained by the Commonwealth than when retained by the defense. Upon being retained, Dr. Kelly assumed an adversary's role, convincing the prosecutor to renege on her agreement with defense counsel that counsel could attend the psychiatric examination of petitioner.

The Byers' plurality's presence of defense counsel being "antithetical" argument mirrors government arguments in Miranda v. Arizona and United States v. Wade, that elicited only the Supreme Court's indignation. See Miranda v. Arizona at 480-481, U.S. Wade at 238.

Recall now the plurality's finding of legislative fact invoked to deny the accused the protection of the

Fifth Amendment: psychiatry is too inexact a science for cross-examination to show the error in a psychiatrist's analysis. This is particularly true when the expert is Dr. Kelly: he states his diagnoses based on general characterizations of the defendant's statements, demeanor, and thought processes, and denies that there are any standard diagnostic criteria against which his criteria can be tested. Because Dr. Kelly's professed opinions have no vital center, absent a record against which to compare his characterizations, he cannot be cross-examined with a rapier, only with a bludgeon. The Catch-22 is that one cannot attack a psychiatrist with a weapon so indiscriminate as a bludgeon without discrediting psychiatry as a science, yet, the defense cannot prevail without convincing the jury to put faith in the very same science it is involuntarily discrediting.

There remains to be discussed Estelle v. Smith, 451 U.S. 454 (1981). There the Court held that a defendant is entitled to the assistance of counsel "before submitting to [a] pretrial psychiatric interrogation". Id. at 469. The Byers plurality reads a negative pregnant into the fact that the Court declined to address the defendant's right to counsel during the psychiatric examination, and in the process gave a "c.f". cite to Thornton v. Corcoran, 407 F.2d 695, 705, 711 (D.C. Cir. 1969). Converse to the plurality's conclusion, the Court found that:

> During the psychiatric evaluation, respondent assuredly was "faced with a phase of the adversary system",

Estelle v. Smith, supra at 468 (emphasis added),

> The psychiatric examination proved to be a "critical stage" of the aggregate proceedings,

Id. at 471, and

> The examination of the petitioner was a species of 'official interrogation' in which the role of the interviewer is 'essentially like that of an agent of the state'

Byers, supra at 1165, quoting from Estelle v. Smith at 467-468. The Court should now act on its findings!

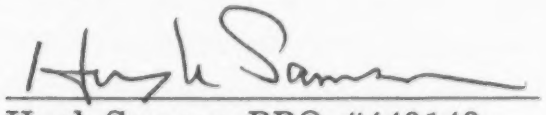
What neither the Byers' plurality nor the Commonwealth can deny is that the decision whether to submit to a psychiatric examination was a "critical stage" at which petitioner had a right to the assistance of counsel. Estelle v. Smith , supra at 472. Counsel's advice was that petitioner offer to undergo Dr. Kelly's examination, but condition the offer on permission to tape record the examination. Counsel so notified the Commonwealth, which petitioned the Court to instruct counsel that the petitioner had to yield unconditionally to Dr. Kelly's examination. Counsel refused to be corrected. When Dr. Kelly subsequently sought to examine petitioner, petitioner asked to tape record the examination. Dr. Kelly then, in the absence of defense counsel, instructed petitioner that he had to submit to the examination and could not tape record it. Rubbish! Whether or not petitioner had a right of constitutional magnitude to tape record his conversation with Dr. Kelly, he had the right under Massachusetts' law to tape record his conversations with anyone he notified of the tape recording. See G.L. c.272, §99.

Please do not dismiss the violation of petitioner's right to counsel recognized in Estelle v. Smith. If petitioner's right to counsel had not been trampled, the issue before the Supreme Judicial Court would have been whether, by placing one small condition upon his waiver on his right to remain silent, a condition within petitioner's common law rights, if not his constitutional rights, and a condition which "may be a good idea", Byers' plurality at 1121, petitioner showed such lack of cooperation as to justify so dramatic a curtailment of his right to present his defense as the exclusion of the testimony of his psychiatrist and psychologist. Blaisdell, supra. Prevailing on that issue would have been a piece of cake, and even if it would not have been, it is defense counsel's job and responsibility to advise his client, especially when the client is a juvenile and mentally or emotionally impaired.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

COMMONWEALTH *VS.* RICHARD C. BALDWIN
[Supreme Judicial Court Docket No. 06875]

Essex, September 8, 1997 - November 10, 1997

Present: Wilkins, C.J., Abrams, Lynch, Fried, Marshall & Ireland, JJ.

Constitutional Law, Self-incrimination. *Practice, Criminal,* Psychiatric examination, Recording of proceedings, Assistance of counsel, Capital case. *Privileged Communication. Mental Impairment. Homicide.*

Discussion of a criminal defendant's constitutional privilege against self-incrimination as it is implicated by a court ordered psychiatric examination of the defendant pursuant to Mass. R. Crim. P. 14(b)(2)(B). [109-110]

This court declined to adopt a new rule that an examination of a defendant pursuant to Mass. R. Crim. P. 14(b)(2)(B) by a psychiatrist retained by the Commonwealth must be videotaped in all circumstances; rather, it remains within the judge's discretion whether to require an electronic recording of a *Blaisdell* interview or to permit counsel to be present at the interview. [110-112, 112-113]

At a murder trial, the judge erred in foreclosing defense counsel's inquiry of the Commonwealth

psychiatric expert on the issue of the expert's reluctance to have conducted the defendant's examination while being videotaped or being observed by defense counsel, as that bore on the expert's credibility, however, where there was no dispute as to what the defendant said to the expert, the judge's ruling was not reversible error, in light of counsel's vigorous cross-examination of that expert, together with the extensive rebuttal testimony of the defendant's experts. [113]

INDICTMENT found and returned in the Superior Court Department on July 14, 1993.

The case was tried before *John L. Murphy, Jr., J.*

Hugh W. Samson for the defendant.

S. Jane Haggerty, Assistant District Attorney for the Commonwealth.

MARSHALL, J. On April 4, 1994, a jury found the defendant, Richard C. Baldwin, guilty of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty.

Before trial, Baldwin notified the Commonwealth of his inten-

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tion to assert a defense of "diminished capacity".[1] A judge in the Superior court granted the

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[1] "[T]here is no 'diminished capacity' defense in this Commonwealth." *Commonwealth v. Parker,* 420 Mass. 242, 245 n.3 (1995). We do recognize evidence of a defendant's mental impairment as relevant to the question "whether the crime of murder was committed at all," *Commonwealth*

Commonwealth's motion for a psychiatric examination of the defendant. He denied Baldwin's request to condition that examination on having the interview recorded or permitting Baldwin's defense counsel to be present during the interview. Baldwin's principal contention on appeal is that the judge's denial of that request violated his rights under the Fifth and Sixth Amendments to the United States Constitution and art. 12 of the Declaration of Rights of the Massachusetts Constitution. We conclude that the conviction should be affirmed, and that the defendant is not entitled to relief pursuant to G.L. c. 278 § 33E.

1. According to testimony at the trial, the victim was killed on November 18, 1992. That day, Baldwin spoke several times on the telephone with a friend, Skye Albert-Hall (Hall), and told Hall in their last conversation that he wanted to die because the victim, a mutual friend, did not want to resume a dating relationship with him. At approximately 4:30 p.m. that afternoon, Baldwin arrived at Hall's home in Groveland. At Baldwin's insistence, Hall went to the victim's house, a short distance away, and persuaded the victim to return to Hall's house with him.

Hall retired upstairs, while the victim and Baldwin talked downstairs. The victim went upstairs twice and the second time told Hall that Baldwin had said he was going to kill her. Baldwin followed the victim into Hall's room upstairs, carrying a metal baseball bat. As he approached the victim, Baldwin

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v. Grey, 399 Mass. 469, 470 (1987), including the issues of intent and knowledge, *Commonwealth v. Sires*, 413 Mass. 292, 299 (1992), and whether a murder was committed with extreme atrocity or cruelty. *Commonwealth v. Gould*, 380 Mass. 672, 683-686 (1980).

asked her several times if she was scared, and then swung the bat at her. She deflected the first blow, falling down. Hall attempted to grab the bat away from Baldwin, but Baldwin pushed him away. Baldwin then swung the bat twice more, hitting the victim in the head, causing fatal skull fractures. At the time of her death, the victim was fifteen years old and Baldwin was sixteen years old.

Following the fatal attack, Baldwin left Hall's house and later

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appeared at the Pentucket Regional High School. He asked for an ambulance because he had swallowed "some pills" and had drunk "some wine". He admitted to the principal and a teacher that he had killed the victim. Baldwin was arrested, charged, and then transported to Hale Hospital in Haverhill. His diagnosis there was a life-threatening ingestion of alcohol, Xanax, and Ibuprofen. While he was hospitalized, he admitted killing the victim to a nurse. Police officers on guard in the hospital room overheard Baldwin speak of the killing to his mother and to his father.

2. Baldwin was charged in the juvenile session of the Haverhill District Court with being a delinquent child by reason of murder. A transfer hearing was held and on July 7, 1993, the judge in that court ordered the juvenile complaint dismissed and the defendant bound over to the Essex County grand jury. On July 14, 1993, an Essex County grand jury returned an indictment charging murder against Baldwin and thereafter he was arraigned in the Superior court. On December 23, 1993, Baldwin filed

a notice regarding "diminished capacity", [2] pursuant to Mass. R. Crim. P. 14(b)(2)(A), 378 Mass. 874 (1978), stating "his intent to rely on expert testimony in connection with issues of premeditation, specific intent and malice", and that each such witness would rely in part on statements made by Baldwin. The Commonwealth responded by filing a motion for a psychiatric examination of Baldwin, pursuant to Mass. R. Crim. P. 14(b)(2)(B), 378 Mass. 824 (1979). The judge allowed the psychiatric examination over Baldwin's objection, and refused Baldwin's request to condition the examination on having the interview either recorded on audiotape or attended by Baldwin's counsel.

Baldwin then filed a petition for a protective order pursuant to G.L. c. 211, § 3, which was denied by a single justice of this court. A motion for reconsideration in the Superior Court of the refusal to place conditions on the psychiatric evaluation of Baldwin was also denied.

The evaluation of Baldwin took place on February 24, 1994. In an affidavit later filed in the Superior Court in connection with a motion to suppress the testimony of the Commonwealth's psychiatrist, Baldwin stated that the had answered the psychia-

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[2] The notice was amended on March 23, 1994, to include proposed expert testimony that Baldwin, by reason of mental disease or defect, "lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law".

trist's questions in the belief that if he remained silent, he would not be allowed to present his defense at trial. The Superior Court judge declined to take any action on Baldwin's motion to suppress because, he said, his earlier order regarding the psychiatric examination "was the subject of a petition to and a ruling of the Supreme Judicial Court".

At trial, in pursuing his defense of mental incapacity, Baldwin called two expert witnesses. The first, a psychiatrist, testified that Baldwin came from a highly dysfunctional family, marked by alcohol abuse and by verbal and physical aggression between his estranged parents and later between him and his father. The expert diagnosed Baldwin as suffering from a major depression episode on the day of the killing. He stated his opinion that depression and repressed aggression prevented Baldwin from conforming his conduct to the requirement of the law and from rationally premeditating the killing, and a dissociate reaction prevented him from forming the requisite intent for murder. Baldwin's second expert witness, a clinical psychologist and consultant to the Department of Youth Services (department), testified that Baldwin suffered from a major depressive episode on the day of the killing, and concurred with the first expert in evaluating Baldwin's criminal responsibility and abilities to premeditate and form a specific intent to kill. In addition, the second expert testified that Baldwin was incapable of appreciating the wrongfulness of his conduct.

As a rebuttal witness, the Commonwealth called the forensic psychiatrist who had examined Baldwin. He testified that he found no signs of mental illness in

Baldwin at the interview or in the records relative to his behavior just after the crime, as reported by Baldwin, Hale Hospital, or the department. He concluded that Baldwin did not suffer a mental disease or defect such that he lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law, nor from a psychological disorder that would have disrupted his ability deliberately to premeditate murder or that prevented him from forming a specific intent to kill.

Baldwin's attorney vigorously cross-examined the Commonwealth's expert on his opinion, in light of Baldwin's experts' contrary opinions, as to Baldwin's mental health. Defense counsel also attempted to show in cross-examination bias stemming from the expert's history of testifying often in favor of the prosecution and against criminal defendants on the issue of criminal responsibility. Defense counsel also reviewed

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the notes taken by the psychiatrist from the interview with Baldwin, noted that the notes were sparse, and cross-examined the expert about those that implied interpretations inconsistent with the expert's conclusions as to Baldwin's mental conditions.

3. A court-order psychiatric examination of a criminal defendant implicates the defendant's constitutional right against compelled self-incrimination guaranteed by the Fifth Amendment and by art. 12. We have observed that full cooperation by a defendant with a psychiatrist, who is an agent of the prosecution, may result in confession of the acts charged, probative admissions, leads to the discovery

of other inculpatory evidence, information with which to impeach a defendant, and evidence as to a defendant's mental capacity. *Blaisdell v. Commonwealth*, 372 Mass. 753, 760 (1977). Only a constitutionally adequate grant of immunity or a valid waiver of the privilege by the person who possesses it suffices to overcome invocation of the privilege in a court-ordered examination. *Id.* at 761.

Rule 14 provides for certain procedures to protect the privilege, while allowing the prosecution to conduct a psychiatric examination in advance of trial, in cases where, as here, the defendant has given notice that he may assert a lack of criminal responsibility because of mental disease or defect and that he will introduce expert testimony that relies on his statements. A report of the examination is sealed and submitted to the judge and may be released in three circumstances: (a) if the judge determines that it contains no privileged information, (b) on the defendant's motion that it be made available to the parties, or (c) if the defendant testifies on his own behalf or offers expert testimony based in whole or in part on his statements as to his mental condition at the time of, or as to his criminal responsibility for, the alleged crime. Mass. R. Crim. P. 14(b)(2)(B)(iii).[3]

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[3] The Commonwealth filed a motion on March 7, 1994, assented to by Baldwin, for production and disclosure, on their being filed with the court, of reports on Baldwin by the Commonwealth's expert, as well as those of two expert witnesses testifying for Baldwin. The report of the Commonwealth's expert was filed with the court on March 21, 1994, and was released to both parties at some time prior to the commencement of the trial on March 24, 1994. The Commonwealth did not seek to introduce opinion or

These procedures are intended to guarantee that privileged

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information is safeguarded until such time as a defendant voluntarily waives his privilege. *Blaisdell, supra* at 764. A defendant who chooses to testify at trial or to proffer expert witness opinion based on his out-of-court statements as to his criminal responsibility waives his privilege and opens to the Commonwealth the opportunity to rebut such testimonial evidence. *Id.* at 766. *Commonwealth v. Harvey*, 397 Mass. 803, 808 (1986).

On appeal, Baldwin claims no violation of these rule 14 procedures. Nor does he claim that privileged information from the court-ordered psychiatric examination was used at trial in any way other than to rebut expert testimony, based on Baldwin's out-of-court statements, which denied his criminal responsibility. He claims only that he should be entitled to condition his cooperation with a court-ordered examination (and subsequent waiver of his privilege at trial) on either a recording of the psychiatric interview or having his counsel present. He claims that the judge's refusal to grant such a protective order denies him not only his privilege against compelled self-incrimination, but also his Sixth Amendment right to counsel.

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evidence based on the court-ordered interview or the Commonwealth's experts' reports until after Baldwin's expert psychiatric witnesses testified to their opinions, based in part on Baldwin's statements, as to his lack of criminal responsibility.

We have affirmed a judge's discretion to allow a defendant intending to interpose an insanity or lack of criminal responsibility defense to videotape a court-ordered psychiatric evaluation. Commonwealth v. Delaney, 404 Mass. 1004, 1005 (1989). We have also upheld a judge's discretion to deny a request that counsel be present at a court-ordered psychiatric evaluation. *Commonwealth v. Delaney*, 404 Mass. 1004, 1005 (1989). We have also upheld a judge's discretion to deny a request that counsel be present at a court-ordered psychiatric evaluation. *Commonwealth v. Trapp*, 423 Mass. 356, 359 (1996). In *Trapp*, we concluded that the decision to undergo psychiatric evaluation is a critical stage of the criminal process, entitling a defendant to assistance of counsel, but that the psychiatric interview itself is not a critical stage. Thus, absent a claim that the judge abused his discretion in the circumstances of this case, a claim not made by Baldwin, Baldwin's Sixth Amendment claim of denial of assistance of counsel fails. We also commented in *Trapp* that "[t]he alternative of videotaping such interviews was not raised at trial. While we agree with the *Byers* plurality that videotaping might be a sound idea, this issue is not before us." *Id.*, citing *United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984) (en banc) (plurality opinion) (denying appeal of request for tape recording or counsel presence at court-ordered psychiatric examination based on Fifth and Sixth

Amendment protections). Baldwin's appeal now raises that issue.[4]

In our cases concerning the recording of custodial interrogatories at police stations, we have declined to say that the Massachusetts Declaration of Rights or the United States Constitution requires electronic recording of such interrogations, nor were we inclined to create such a common law rule. See *Commonwealth v. Diaz*, 422 Mass. 269, 273 (1996); *Commonwealth v. Fryar*, 414 Mass. 732, 742 n.8 (1993), S.C., 425 Mass. 237 (1997). We recognized the merits of recording such interrogations, *Diaz, supra* at 272-273, and that electronic recordings would be a "helpful tool in evaluating the voluntariness of confessions". *Fryar, supra* at 359, that videotaping "might be a sound idea". Our acknowledgment, however, of the advantages in many circumstances to recording either interrogations by police or interviews by psychiatrists does not lead us to announce a categorical rule on electronic recording in either context.

The court in *Byers* observed that while a "good idea", the recording of psychiatric interviews had not

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[4] We recognize that videotaping may both be more intrusive and produce a more complete record of a psychiatric interview as compared to audiotaping, considerations that should be taken into account by a judge in the exercise of discretionary judgment. Given our holding, *infra*, that a defendant has no constitutional right to the less intrusive audiotaping, our conclusion also applies to potentially more intrusive video recording. See *Commonwealth v. Stockwell, ante* 17 (1977).

been embodied in the Constitution in general or the Sixth Amendment in particular, which provide the minima of criminal process under the Federal Constitution. *Byers*, *supra* at 1121. A crucial piece of evidence in that case was a statement by the defendant in the psychiatric interview that only after commission of the crime had his wife suggested to him and had he adopted as his own belief that he could have been under the influence of "magic, spells or some influence of roots". *Id.* at 1108. That statement was "very devastating" to the defendant's defense that he was insane at the time of the crime. *Id.* The court nonetheless observed that the defendant had the opportunity, in cross-examining the prosecution's psychiatric expert, to contest the accuracy of both details of and conclusion from the interview, to point out the absence in the psychiatrist's written report of the critical statement attributed to the defendant, to introduce other witnesses to

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show that the statement attributed to him was not true, and to introduce contrary conclusions of other psychiatrists. *Id.* at 1121.

In the case before us, unlike the *Byers* case, neither side disputes what Baldwin said in the psychiatric examination. While Baldwin does claim that the Commonwealth's expert was biased, he does not claim that the expert fabricated any evidence. Nor does Baldwin argue to us that statements in the interview disclosed at trial by the Commonwealth's expert were critical pieces of evidence, unavailable from any other source, which inculpate him in the

commission of the crime or that prove the Commonwealth's case that Baldwin had the requisite mens rea or mental capacity for his alleged acts.[5] Baldwin claims rather that the bias of the Commonwealth's psychiatrist led him to misinterpret Baldwin's statements and that the expert's characterization of Baldwin's statements could not be tested for reliability because no tape recording was permitted. The answer to that is vigorous cross-examination of the Commonwealth's expert and rebuttal with other expert witness testimony, not a

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[5] In our review of the record, we have identified only one statement by Baldwin to the Commonwealth's psychiatrist, not otherwise available to the prosecution, which arguably adds to the Commonwealth's case concerning Baldwin's appreciation of the wrongfulness of his conduct. Baldwin disclosed during the interview that, after he fetched the metal bat from his car and returned to Hall's house, he kept it hidden from the victim's sight behind his back and behind a kitchen counter. That information, together with other information, formed the basis of the psychiatrist's conclusion as to Baldwin's appreciation of the wrongfulness of his action. However, Hall's testimony corroborated Baldwin's attempt to conceal the bat when Baldwin stood in the doorway to the upstairs room where the killing occurred. Whether the evidence concerning concealment of the bat was used to help establish appreciation of wrongfulness, premeditation, or specific intent, Baldwin's statement unique to the psychiatric examination is cumulative of other evidence and does not appear critical to the psychiatrist's opinion, nor to the jury's verdict. There is no claim that this isolated disclosure was "very devastating" or that it would "take the wind out of the defendant's sails and perhaps . . . torpedo him out of the water". *United States v. Byers*, 740 F.2d 1104, 1108 (D.C. Cir. 1984) (en banc) (plurality opinion).

new rule that examination by the Commonwealth's psychiatrist must be recorded in all circumstances.

Baldwin's defense counsel did attempt to cross-examine the Commonwealth's psychiatric expert regarding the expert's own opposition to a tape recording or defense counsel's attendance at the expert's interview of Baldwin. The Commonwealth objected to this line of questioning, and the judge sustained the

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objection, foreclosing any discussion at all on that issue, because, the judge stated, this court already had determined that the examination would be made without the presence of defense counsel or a tape recorder. In fact, the order of the single justice reflects that he had declined to interfere with the trial judge's discretion in denying the requested protective order and therefore denied relief under G.L. c. 211, § 3. The single justice had neither ordered, approved, or disapproved of conditioning Baldwin's examination on its being tape recorded or attended by defense counsel. Defense counsel's purpose for this line of questioning was not to engage the expert in the legal issue that is the subject of this appeal, but rather to elicit evidence of the expert's own reluctance to be monitored and thereby to cast doubt on the expert's credibility. The judge's ruling foreclosing that inquiry by the defendant was error. Even though we have declined to adopt a rule requiring tape recordings of custodial interrogations by police, we have said that counsel is entitled at trial to pursue the failure of police to record a defendant's statements in custody. *Diaz, supra* at

273. As in that context, so too here, we think that wide-ranging cross-examination, including inquiry as to why an accurate record was not made of a psychiatric interview, is the appropriate antidote to potential overreaching, bias, or mischaracterization of evidence by an agent of the State. In light, however, of the vigorous cross-examination that defense counsel did conduct of the Commonwealth's expert, together with the extensive testimony of defendant's own experts, we conclude the judge's ruling was not reversible error. We are confident in light of the entire record that the error did not influence the jury. See *Commonwealth v. Federico*, 425 Mass. 844, 852 (1997); *Commonwealth v. Flebotte,* 417 Mass. 348, 353 (1994).

We hold that it is within the judge's discretion to require an electronic recording of the *Blaisdell* interview or to permit counsel to be present at the interview. Even if the examination of a defendant by a psychiatrist retained by the Commonwealth is not recorded, the judge may nevertheless exclude all or a portion of the expert's testimony if it is found to be unreliable.

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4. We have reviewed the entire record pursuant to G.L. c. 278, § 33E, and find no additional reason to exercise our

power either to reduce the murder verdict or order a new trial. Accordingly, we affirm Baldwin's conviction.

So ordered

APPENDIX B

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS
1212 Courthouse, Boston, Massachusetts 02108
(617)557-1020

Hugh W. Samson
Conlon, Samson and Conlon
73 North Common Street
Lynn, MA 01902

RE: No. SJC-06875

COMMONWEALTH
vs.
RICHARD C. BALDWIN

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the Court and is denied.

Jean M. Kennett, Clerk

Dated: December 30, 1997

To: Kevin M. Burke, District Attorney
S. Jane Haggerty, A.D.A.
Hugh W. Samson, Esquire
Comm. for Public Counsel Svcs.\
Leslie Walker, Esquire

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. 94-019

RICHARD BALDWIN

vs.

COMMONWEALTH

MEMORANDUM AND ORDER

This petition under G.L. c. 211, §2, has been submitted for decision on the papers. The motion to designate the Justices of the Superior Court as a nominal party is allowed. The decision whether to issue a protective order of the scope and specificity of the sort requested by the petitioner (the examination in question otherwise being subject to the procedures set forth in Blaidsell v. Commonwealth, 372 Mass. 753, [1977], and Mass. R. Crim. P. 14 [b] [2]) was within the discretion of the judge. I decline to interfere with that discretion under the authority granted in G.L. c. 211 §3. The petitioner's requests to have counsel present at the examination and/or to have it tape recorded are denied. The matter of the completeness (or the lack thereof) of Dr. Martin Kelley's ultimate report to be furnished to the petitioner's counsel can be taken up with the Superior Court judge handling the case and need not be considered here.

By the Court (Greaney, J.)

Entered: January 31, 1994